In the

Supreme Court of the United States

October Term, 1958

No. ~~560~~ 19

UNITED STATES OF AMERICA,
Petitioner

v.

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE CHESAPEAKE AND OHIO RAILWAY COMPANY IN OPPOSITION

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SUMMARY STATEMENT OF MATTER INVOLVED

This is an action for the recovery of balances of unpaid transportation charges on fifty government carload shipments moving by railroad from Pontiac, Michigan, to Newport News, Virginia, in the period between December 10, *1941*, and January 31, *1942*. The articles shipped were military supplies, and it was originally intended that they would be exported from Newport News, in ocean vessels via the port of Rangoon, for delivery to the Republic of

China. However, they were unloaded and delivered at Newport News and remained there on government controlled piers. On March 8, 1942, the port of Rangoon fell to the Japanese military forces.

According to an offer of proof by the government in the form of a photostat worksheet or transcript of information from Department of Army records, tendered in evidence as "Exhibit 1", it was averred that on varying dates in May, 1942, the shipments were reloaded at Newport News onto railroad cars and consigned on new bills of lading to an inland government storage center, at Bloomfield, N. J.; that thereafter, on June 1st and 2nd, *1943*, the articles shipped were reconsigned to another storage center at New Cumberland, Pa., and that later in that month, some portions of the original shipments were reconsigned to Wilmington, Calif., and other Pacific Coast points, from which they were exported to India on ocean vessels (Appellant's App'x. 41; 45; Appellee's App'x. 1-2).

Transportation charges on the movement from Pontiac to Newport News were assessed by the respondent in accordance with the applicable published domestic rate between those points, and were paid by the government. Later, upon audit, the General Accounting Office recomputed the charges upon this movement at the export rate, which was a lower rate. Enforcement of this lower rate was effected by deductions made several years later from other undisputed transportation bills rendered to the government (Account attached to Complaint). This aggregate sum of deductions is the amount for which recovery is sought herein.

This action was brought in March, 1952. In the meantime, a companion case between the same parties, involving charges between the same points and accruing under almost identical circumstances, was tried, and resulted in a judg-

ment for the plaintiff railway company, for charges calculated at the domestic tariff rate. That was the case docketed in the same District Court as *No. 1268*, and referred to as such in the petition. That case was appealed by the government to the Court of Appeals for the Fourth Circuit, and the judgment was affirmed by that Court on August 14, 1954, with a printed opinion which is reported as *United States* v. *The Chesapeake and Ohio R. Co.*, 215 F. 2d 213. No petition for writ of certiorari was filed in this Court. A Stipulation of Counsel had been previously filed in the instant case to the effect that the final judgment in No. 1268 "shall govern the disposition of the claims involved in this action to the extent that it is applicable." (Appellant's App'x. 37-38).

DISTRICT COURT PROCEEDINGS

At a pre-trial conference in the instant case held on December 9, 1954, government counsel presented an oral motion "to refer this case to the Interstate Commerce Commission to determine whether the domestic tariff rate involved in this proceeding is reasonable *if it should be determined that the shipment involved, or any part thereof, was subsequently exported.*" (Italics supplied). While this motion was denied, the Court in the same order specifically announced that "the question for determination * * * at the hearing of this case on its merits," would be "whether the ultimate exportation of the shipment, or any part thereof, results in causing the export tariff rate to Newport News" to be applicable to whatever portions were shown to have been exported (Appellant's App'x. 39).

The case was heard in the District Court upon a Stipulation of Facts (Appellant's App'x. 40-42), to which were attached, the photostat worksheet "Exhibit 1," already

referred to, and pertinent pages of Tariff No. 218-M, "Exhibit A", showing the provisions governing the use of export rates, as well as upon the oral testimony of two witnesses tendered by the respondent and statements of counsel, as transcribed by the Court reporter (Petition 7, and Reporter's Transcript, Appellee's App'x. 3-20). The respondent filed a motion in writing, upon grounds stated, to reject and exclude the proof (Exhibit 1) tendered by the government in support of its contention that the export rate applied to such shipments or parts thereof, as may have been ultimately exported (Appellant's App'x. 42-43). For the purposes of this motion, it was assumed that the subsequent movements of the articles shipped were as indicated in Exhibit 1.

Demonstrating the scope and limits of the District Court's hearing and decision on the merits, are the following excerpts from pages of the Reporter's Transcript of Testimony (Appellee's App'x.):

[TR. PP. 1-3]

"THE COURT: So the only question for determination at this time is whether the ultimate exportation changes the tariffs as applied to the initial shipment to Newport News?

MR. SPICER: Yes, sir. We asked for charges from Pontiac, Michigan to Newport News, and the case is similar in every respect to the case tried before Your Honor, one of the cases in which there was a stipulation by Counsel that this was frustrated traffic. The position was taken that Your Honor had not passed on a situation where the goods were exported eventually.

THE COURT: After they left the possession of the carrier?

MR. SPICER: Yes. Our position is that this would not be sufficient to change the rate and make the exportation rate applicable.

MR. RYDER: We are now offering to prove the facts set forth in Exhibit 1. Those facts in this column show what happened to the goods shipped under the bill of lading referred to in this suit.

THE COURT: As I understand, the government is offering at this time to prove that certain portions of these shipments, after having been diverted from Newport News, and after having left the possession of the carrier, were ultimately exported from some other port?

MR. SPICER: Yes, and I prepared a motion in line to bring our objection to that proof. We are objecting to your receiving that evidence and ask that it be excluded from these papers. * * *

THE COURT: All right, gentlemen, I think I understand the questions."

* * *

[TR. P. 20]

"THE COURT: Do you have any evidence, Mr. Ryder?

MR. RYDER: Nothing beyond what we offered to prove, as set forth in Exhibit 1.

MR. SPICER: I would like to have the statement in the Record that there is no representative from the General Accounting Office of the government to make any explanation of the records, which made it necessary for me to call for the explanation in the evidence I have just presented."

* * *

[TR. PP. 21-23]

"THE COURT: You have nothing further for the Record?

MR. SPICER: No, sir.

THE COURT: Do you desire, Mr. Ryder, to be heard in opposition to this motion?

MR. RYDER: No, sir, except we do not agree to the motion and object to it.

THE COURT: You object to the motion?

MR. RYDER: Yes.

THE COURT: Gentlemen, as I understand from your statements and from the Stipulation and exhibits, as well as statement of the Counsel; the facts, briefly, are these:

The shipment involved was from Pontiac, Michigan, to Newport News, Virginia, destined for export to Rangoon. Upon arrival at the port of Newport News, the government, due to the fall of Rangoon, diverted, or caused to be diverted, this shipment which was reshipped to other points in the United States. The goods left the possession of the carrier, the Chesapeake and Ohio Railway Company, without having been exported from Newport News, the Atlantic Seaboard port of proposed exportation. Subsequently, after the goods had left the possession of the carrier, the goods, or a part of them, were exported from other ports in the United States, but not from Newport News.

The question proposed is whether the export rate is applicable from Pontiac, Michigan, to Newport News, Virginia, and from the stipulations and exhibits and statements of Counsel, independently of the testimony which has been offered, it appears clear to me that the export rate does not apply under said circumstances from Pontiac, Michigan, to Newport News, Virginia; and therefore, proof of ultimate exportation from other ports, as indicated by Exhibit 1, would not change the applicable tariff, which should be the domestic rate from Pontiac, Michigan, to Newport News, Virginia. Therefore the motion of the Plaintiff to reject proof of ultimate exportation of the shipment will be granted, and the offer of the government, as set out in paragraph four of the Stipulation, will be denied.

Do you gentlemen have any comment concerning the procedure?

MR. RYDER: The only other thing, then, is to enter judgment order.

THE COURT: In the amount set forth?

MR. RYDER: Yes.

THE COURT: Could not an order be entered showing the Court's rejection of the proof?

MR. SPICER: Yes, and I have presented an order which reads that the Defendant, having no further defense to present, it is considered that the Plaintiff recover the amount as stated.

THE COURT: Do you have any contrary suggestion, Mr. Ryder?

MR. RYDER: I would like to suggest to the Court that the order be changed to read, in the third line, that the Defendant offered to present proof of the ultimate export in accordance with Exhibit 1, rather than a general statement such as this is.

MR. SPICER: I think that is proper.* * *"

Hence, contrary to what is stated on page 1 of the petition, the Judge of the District Court did deliver an oral opinion briefly outlining the principal facts and applying the law, which was transcribed as a part of the record in that court.

The judgment order (Appellant's App'x. 43-44) in favor of the respondent, shows that it was predicated upon a sustaining of the motion to exclude the government's evidence as to ultimate exportation of the articles shipped, because such evidence was insufficient to make the export rate applicable. Tariff No. 218-M, Item 23030 (Petition 7), showed on its face that it only applied to "North Atlantic Seaboard ports of export," and only upon traffic delivered

by the rail carriers direct to export vessels or to piers at the ports for exportation and on which proof of actual exportation is furnished. There was no pretense on the part of the government that these provisions of this tariff had been actually complied with, or that the rate therein stated was "applicable as a matter of tariff construction." There was no explanation made of the delay involved in the several inland movements and no effort to show any continuity between them. Nor was there any attempt to show that the domestic rate assessed by the respondent was *per se* invalid or unreasonable.

The statements on page 11 of the petition "(2) that in any event the issue which the Government sought to refer was one to be determined judicially rather than administratively", and that "This holding conflicts with decisions of this Court and of other courts of appeals in an important area of judicial administration and, additionally, is at variance with the understanding and practice of the Commission as manifested by decisions of that agency * * *," are incorrect and without justification. The Court did not decide that the issue of reasonableness under Section 1 of the Interstate Commerce Act was to be determined by the courts. Also, there is no conflict in the decision with holdings of this or other courts or with the practice before the Interstate Commerce Commission.

An adequate summary of the material facts of the case appears in the *per curiam* opinion of the Court of Appeals, reported at 224 F. 2d 443, and the background facts are set out in greater detail in the earlier opinion delivered by Chief Judge Parker on behalf of the same Court, in the previous case, No. 1268, *United States* v. *Chesapeake and Ohio Railway Co.*, 215 F. 2d 213.

REASONS FOR DENYING WRIT OF CERTIORARI

Neither ground relied upon by the government on page 11 of its petition to justify a review by this Court is supported by the record of what occurred in the trial Court.

Both the orders entered in the instant case and the Reporter's Transcript of Testimony show that in the trial court the binding force of the final decision in case *No. 1268* was properly recognized as to all features of the case, except as to any portions of the shipments which might be shown to have been exported at some remote time. The Court clearly denied the motion to refer the case to the Commission *for lack of merit*, and without any mention or consideration of the two-year period of limitation found in Section 16(3) of the Interstate Commerce Act (49 U. S. C. § 16(3)(b)) by either counsel or court. There are, as a matter of fact, a number of cases in which the Commission has upheld the application of domestic rates to "frustrated" shipments, as not being unreasonable. See *Hanlon-Buchanan v. Burlington, R. I. R. Co.*, 258 I. C. C. 519, affirmed 263 I. C. C. 603; *California, Texas Oil Co. v. Bessemer & Lake Erie R. Co.*, 264 I. C. C. 147; *Pacific Chem. & Fert. Co. v. Penn. R. Co.*, 268 I. C. C. 468, and *Amer. Republics Corp. v. Wichita Falls & S. R. Co.*, 259 I. C. C. 605.

As was aptly said by the Court of Appeals, in its opinion in this case, in 224 F. 2d 443, 444:

> "The only question involved is whether the export or the domestic freight rate is properly applicable to a shipment where there was an intention to export at the point of origin but where this intention was abandoned when the shipment reached the port from which exportation was to be made, so that what started out as a shipment for export was converted by the shipper into a domestic shipment."

In neither court was the decision or outcome of the case dependent upon a ruling on the two-year statutory limitation.

It is interesting to observe as to the error now alleged, that as recently as May, 1954, the government's brief, prepared by almost the same group of counsel for the Court of Appeals for the Fourth Circuit, in case *No. 1268*, at page 26, contains the following admission as to a similar factual situation:

> "By virtue of Section 16(3) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U. S. C. 16(3), reparation proceedings must be brought within two years after the delivery or tender of delivery by the carrier. Cf. *Louisville & Nashville R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, 226. The United States as well as private shippers is bound by that limitation."

The present action involved very simple facts. It was an ordinary proceeding to enforce payment of published transportation charges under a tariff provision which was neither ambiguous nor obscure. There was no challenge made to any of the specific terms of the tariff. The only defense at the trial was that the delayed exportation, although it occurred eighteen months subsequent to the original movement to Newport News, and also after the articles had completely left the respondent's possession, by means of three successive domestic reshipments and through ports not covered by the tariff at all, was still sufficient to authorize the export rate being applied to the original movement.

This was also noted by the Court of Appeals, in 224 F. 2d 443, 444:

> "The question was not the reasonableness of rates,

which everyone conceded to be reasonable, but which rate was applicable to the shipment under the circumstances of the case, a question which the Court was competent to decide. There were before the Court no such administrative questions as were involved in *United States* v. *Kansas City Sou. R. Co.*, 217 F.2d 763, upon which appellant relies."

A like statement is found in the opinion of the same Court in case *No. 1268*, at 215 F. 2d 213.

The failure to show compliance with the export tariff requirements was so palpable as to present no real problem, either of fact or of tariff construction, and certainly no administrative problem. Hence, there was no need for the specialized or technical knowledge and qualifications of an administrative body.

This respondent further submits that in the trial court there was no general allegation made of unreasonableness with respect to the tariff rates involved. The sole argument there was, that it would be unreasonable to enforce the domestic rate on those articles which were eventually exported, regardless of whether such exportation was in due time and otherwise in accordance with the tariff requirements. As to those portions of the shipments not exported at all, the government was foreclosed from challenging the applicability of the domestic rate, by the terms of the stipulation of counsel, and the judgment entered in case *No. 1268*, as is recognized in a footnote at the bottom of page 9 of its petition.

To the statement made on page 14 of the petition that the government's "uniform position below" was that it is unreasonable to charge the domestic rate on traffic which is prevented from being exported from the consignment port "solely by reason of wartime developments occurring subsequent to the arrival of the goods at the port", it is sufficient

to say that the record fails to show that any such argument was presented by government counsel in the District Court in this case, probably because it was considered as precluded by the prior ruling to the contrary, in case *No. 1268*. In this connection, it is to be observed that none of the shipments were consigned from Pontiac until after the attack on Pearl Harbor had occurred. Nor was the fall of Rangoon a totally unexpected event.

The argument of the government, presented on pages 16 and 17 of its petition, that the Interstate Commerce Commission decisions in reparation proceedings cited (of which *C. B. Fox Co.* v. *Gulf, Mobile & O. R. Co.*, 246 I. C. C. 561, is typical), are either persuasive or binding authority in the present case, is effectively rebutted and overcome by that portion of the Court's opinion in case *No. 1268* dealing with this subject, wherein it is pointed out that in that case the abandonment of intent to export was *voluntary*, and not due to conditions over which the shipper had no control, as was the situation in the decisions cited. Likewise, in the instant case, the government, through the War Shipping Administration, was shipping Lend Lease goods of all kinds to various parts of the world and a vast fleet of vessels was available for its purposes. If the military authorities, because of the fall of Rangoon, changed the destination of the articles involved herein for reasons of war strategy, this was not a risk which the carriers were obligated or expected to bear. In any event, the power of decision, as well as the legal consequences of such a change, would rest with the military authorities. The mere existence of war conditions did not *ipso facto* suspend or nullify existing legal relations between shippers and carriers. Certainly it was not possible for the shipper in this case to have an issue "framed", by a general plea of unreasonableness, several years after the transportation services have been rendered, and thereby

upset the enforcement of the legal freight rate. The petitioner seemingly concedes that its shipments did not qualify for the rate contended for, but seeks to offer a belated as well as vague excuse for non-compliance with the tariff, which has no evidential support.

CONCLUSION

It is earnestly submitted that the two decisions and judgments in the courts below were plainly right and were fully in accord with reason and legal authority. No novel questions of law were presented and there is no real conflict with rulings of other Federal Courts. To argue that the District Court was not competent to pass upon the uncomplicated set of facts presented and to apply the clear provisions of the appropriate tariff thereto, is to ignore the obvious and indulge in sophistry. The petition for writ of certiorari should therefore be denied.

To enable the Court to readily ascertain the issues presented in the trial court, an additional Respondent's Appendix to this brief is annexed hereto, incorporating several legal papers, including the trial court order of judgment, which were in the Appendix to the government's brief in the court below, but have not been reprinted by the petitioner to accompany its petition.

Respectfully submitted,

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January 5, 1956.